

(916) 324-6594

August 13, 1984

Mr. Robert L. Risberg
Tehama County Assessor
P. O. Box 769
Red Bluff, CA 96080

Attention: Mr. C. Gary Hendricks
Chief Appraiser

Dear Mr. Hendricks:

Property Deeded to J. RANCH

This letter is in reply to your letter with attachments of June 20, 1984 to the attention of Richard Ochsner in which you set forth the following facts:

1. The seller agreed in writing to sell the property to buyer for nothing down provided that the buyer make certain improvements to the property prior to close of escrow.
2. Escrow closed before any improvements were made.
3. A deed from the seller was recorded May 13, 1983 and the buyer took possession.
4. The buyer made four payments on the purchase note and then defaulted. The buyer made no other payments and made no improvements to the property.
5. A Trustee's Deed back to the seller was recorded February 27, 1984.

The seller now contends that since the conditions of sale were not complied with, no sale took place and thus no change in ownership occurred.

The general rule is that when the deed is delivered or recorded by an escrow agent before the conditions specified in the escrow instructions are satisfied, the transfer is void

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and no title passes to the grantee. Todd v. Vestermark (1956) 145 Cal. App. 2d 374, 377. On the other hand, if the escrow closes without compliance with the conditions specified in the escrow instructions, a party may be held to have waived the deviation by failing to make timely objection. Security-First Nat. Bank v. Clark (1935) 8 Cal. App. 2d 709. In the case of Jolin v. Spira (1949) 94 Cal. App. 2d 356, for example, the escrow instructions provided that as a condition to the escrow the buyer would receive a "termite clearance." The seller, however, submitted a one-year old termite report which contained a two-year guarantee. After the escrow closed, the buyer discovered termite and dry rot damage and sued for breach of contract. The court found that the buyer had orally accepted the termite report. Moreover, since the buyer saw the report before the escrow closed and failed to object to it, the court held that he waived satisfaction of the escrow condition. In arriving at its decision, the court noted the following rules concerning waiver:

"Nonperformance of conditions set up in escrow instructions 'may be waived by the party who is entitled to demand performance. Failure to perform within the specified period may be waived and indeed a party may waive any condition....'

"A waiver is defined...as 'the intentional relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right and may result from an express agreement or be inferred from circumstances indicating an intent to waive'....

"Whether there has been a waiver is ordinarily a question of fact."

Here, one of the conditions of escrow was that the buyer was to make certain improvements to the property prior to the close of escrow. Although this condition was never satisfied by the buyer, the seller, in a letter to the assessor dated June 13, 1984, explained that she agreed to close escrow before any improvements were made because the buyer had ordered building materials and wanted possession to start work and because the buyer had horses boarded and wanted possession so that the money spent on boarding horses could instead be spent on the property. After the close of escrow, the seller accepted payments on the note and did not at any time dispute the

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validity of the deed or the title of the buyer. Under the foregoing circumstances, it seems clear that the seller waived the performance of the condition in question. The deed recorded May 13, 1983 was therefore valid and a change in ownership presumably occurred on that date. Another change in ownership occurred when the seller took possession under the trustee's deed in accordance with Property Tax Rule 462(g)(2).

If you have further questions concerning this matter, please call or write.

Very truly yours,

Eric F. Eisenlauer
Tax Counsel

EFE:fr

bc: Mr. Gordon P. Adelman
Mr. Robert H. Gustafson
Mr. Verne Walton
Legal Section